

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 90 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA

and

MR.JUSTICE H.L.GOKHALE

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

1 to 5 : No

MOHMAD YUNUSH MOHMAD ISMAIL

Versus

STATE OF GUJARAT

Appearance:

MR VIVEK BAROT for the appellant.

Mr.Y.F. Mehta, APP for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 27/12/96

ORAL JUDGEMENT : (Per N.J. Pandya, J.)

The accused/ appellant has been convicted for offences under sec.302 of Indian Penal Code by the learned Additional Sessions Judge, Ahmedabad Rural at

Mirzapur in Sessions Case No.88/88 by judgment dated 31.1.1989. By way of sentence, rigorous imprisonment for life has been awarded and fine of Rs.200/- and in default of which to undergo rigorous imprisonment for two months, by the said judgment.

2. The case against the accused/ appellant is that on 6.4.1988 at about 1.30 PM by pouring kerosene upon Lilaben, with whom the accused had illicit relations, ignited her and caused her death by burning.

3. So far as the evidence against the accused is concerned, the testimony of neighbours as held by the prosecution is as mentioned hereinbelow and the prosecution has only one witness, Jayaben, a girl aged about 13 years, daughter of the deceased.

4. From the evidence it has transpired that the family of the deceased and the family of the accused have had close relations with each other; children of both the families were on visiting terms and so were the elders. On the fateful day at about 11.00 AM all the three daughters of the deceased had gone to the house of the accused. It is understandable that the husband of the deceased, Amritgiri Manigiri Goswami referred to in the testimony as Giribhai and one Bhupatsinh, were all three serving in the State Police Force at Ahmedabad. Therefore, they knew each other; and also on occasions they were staying as neighbours in the State Police line at Ranip or at Sabarmati.

5. Having gone to the house of the accused, said girl Jayaben along with her two younger sisters, had stayed there till the time that the accused came back having suffered injuries and she overheard the accused talking to his wife, namely, Rashida. The prosecution case against the accused is based on what she heard.

6. So far as the starting of the investigation is concerned it is said to be against the accused on the basis of the complaint given by the Lalabhai Hirabhai, PW-2, Exh. 7, (page 24), who happens to be the brother of the deceased, a rickshaw driver. On the day of the incident about 11.00 AM he goes to the house of his sister Lilaben, since deceased and after taking some snacks he goes out for plying rickshaw. At that time he inquires about the three daughters of the deceased Lilaben, who are the nieces of Lalabhai Hirabhai and he learns from Lilaben that the girls have gone to the house of the accused. At about 5.00 PM he comes back from his work and learns that Lilaben has been done to death in

the aforesaid manner and he also indicates the name of the accused being implicated. On that basis his complaint is recorded, after 9.30 PM. However, when he reached the house the Police team had arrived at the scene and they were obviously investigating into the matter.

7. Before that another development that has taken place is required to be now noted. This development is attributed to the accused himself. The accused did receive burn injuries on both his arms including palms and on his legs also he had burn injuries. According to the accused he received those injuries while trying to save the deceased and for which purpose he has thrown a quilt over the deceased. The clothes worn by him were of synthetic material and therefore, they caught fire and stuck to his skin as a result of heat. He rushed back to his house on scooter and ultimately in the company of his wife the accused went to V.S. Hospital. On his way to Hospital he went to Ranip Police Chowky which is under Sabarmati Police Station. Therefore, Ranip Police Chowky is first to know the accused having received burn injury and though an attempt was made to call an ambulance, which having been failed the accused reached V.S. Hospital in company of his wife, where information came to be given by the doctors on duty. Therefore, Hospital Duty H.C. has prepared a note which makes an interesting reading. It refers to note having been made at the instance of Head Constable, Popatlal who was informed by Dr. Chandana, CMO, V.S. Hospital that one person named, Mohammed Yunus Ismailbhai, aged 30, staying at Ranip Police Line Block No.2/18 has come on that day, the 6th April 1988 at 1500 hours with burn injuries from the place of Bhupatsinh Kesarisinh, i.e. from Narmada Society, Ranip and that he has been admitted to Jain/1 (Presumably 'ward'). On the basis of this information the Police moved in the matter.

8. This movement was reflected by the Executive Magistrate being brought in for recording statement of the accused himself which at the relevant time was treated as dying declaration to be so recorded at exh.11 (page 34). In response to question no.15 while describing the incident, in brief, the accused refers to Bhupatsinh and directly implicates Bhupatsinh to the effect that the accused had come to the house of the deceased for taking his tiffin box and that the accused saw Bhupatsinh and Lilaben quarrelling with each other. While so quarrelling, suddenly Bhupatsinh poured kerosine over Lilaben, put her aflame and then ran away. Amritgiri, the husband of Lilaben was absent at that

time. The accused tried to put off the fire and in the process the accused has thrown quilt over the deceased lying nearby and while performing this exercise he received burn injuries on both the arms including palms. Then the accused went back to his house on scooter and informed his wife and then went to hospital.

9. The initial disclosure clearly points out the implication of Bhupatsinh. No doubt that at the instance of the present accused/ appellant, who at that time might not have suspected of the same. However, dying declaration, exhibit 11, which came to be recorded between 6.15 PM to 6.40 PM was soon followed by said complaint implicating the accused/ appellant herein.

10. Two Police officers were initially involved with the investigation. First officer being Shri Karansinh Fatehsinh Gohil, PSI, exh. 34 (page 90) and another officer Shri Mahuratsinh M. Thakore, PW-15, exh. 35 (page 92), both in their way, on coming to know about Bhupatsinh's involvement, have tried to find Bhupatsinh, but have failed in doing so. In the meantime, failing to investigate and making progress in terms of Bhupat's involvement, the officers have recorded the statements of the injured Mohammed Yunus and so the case made progress after the complaint. No doubt he became accused and the matter proceeded in that direction.

11. The girl, Jayaben is one of the important witnesses for the prosecution. In the absence of the father, Amritgiri in Ahmedabad, the statement of the girl, Jayaben came to be recorded two days after the incident. For the first time her evidence implicated the accused which came into the hands of the investigating agency in the aforesaid manner.

12. Postmortem examination of the body of the deceased was performed. Clothes of the deceased along with other articles obtained from the place of incident were sent for forensic examination including obtaining report as to presence or absence of kerosine on these articles.

13. In this background the learned advocate Shri Vivek Barot for the accused/ appellant has very fairly conceded pointing out the statement of the girl, Jayaben which is so far as prosecution case is concerned it is dead against the accused/ appellant. He then developed his case on the basis that though right from the beginning consistently the accused/ appellant has pointed unerring finger towards Bhupatsinh to the prosecuting

agency, however, for inexplicable reason(s) best known to the agency, it has chosen to ignore this line of investigation. As if this is not enough, Bhupatsinh has been examined as a witness of the prosecution after obtaining special permission of the Court as he was never cited as witness. Curiously, Bhupatsinh explains his absence on the scene for two months or so in his examination in chief. The defence on its part had been pointing accusing finger at the said Bhupatsinh, who has not been enquired against by the investigating agency, which suggests obviously inaction on the part of the investigating agency and bias in its investigation against the appellant.

14. It is not possible in this Appeal, to find out the guilty; nor is it the purpose of the entire trial to find out as to who is guilty. The exercise is limited to find answer to the question whether the charge levelled against the accused before the trial court and now the appellant before us has been brought home or not. If it is proved against him and no reasonable doubt is created the consequence, of course, ought to be conviction followed by sentence. If there be a manner of doubt, obviously, the benefit thereof would go to the accused.

15. In the aforesaid background, learned advocate Shri Barot, therefore, developed the case on the following lines :

(i) There is inaction on the part of the investigating agency to pursue the line of inquiry against Bhupatsinh. Strictly speaking, according to Shri Barot, the learned advocate, said statement, exhibit 11 of the accused should have been treated as complaint because it sets out all the details required for disclosure of a cognizable offence. Therefore, that should have been treated as FIR explaining the death of the deceased, Lilaben. He further submitted that in case of examination based on FIR, the Police may place that material before the concerned Magistrate competent to deal with the matter stating that the case as disclosed by FIR is not made out, but instead it is the complainant himself who is the accused, according to material gathered by them. This is admittedly not done. To that extent the Police have not acted in the manner expected of them. We agree with Shri Barot, learned advocate for the appellant on this score.

(ii) Depending entirely on the version of Jayaben which has been recorded for the first time by the Police in a form of a statement two days after the incident and till then what she has stated to any one - whether she has said anything to anyone; is not brought before us. Though the statement of Amritgiri indicates that on his meeting Jayaben after the incident, she gave him the name of the accused to have burnt the deceased Lilaben. Jayaben refers the accused as 'Pathan Kaka' and Lilaben was referred by her as 'mummy'. This is to be found in deposition of PW-4 (page 36), in last two lines of the examination in chief. The defence has been careful enough to bring out that this is the omission which is materially affecting the case against the accused and while cross-examining, the investigating officer, who had recorded the statement of witness, Shri Thakore, was put this question and at page 95. P.I. Thakore, PW 15, exh.35 states that in the statement before him Amritgiri has not disclosed that Jayaben blurted out the statement of Pathan Kaka having been the one burn her mummy to death.

(iii) The third aspect is with regard to absence of kerosine on any of the articles connected with the accused. For this, one may refer to the report of Forensic Science Laboratory at page 97, exh.37. At page 98, as to presence or absence of kerosine particles from marks 'B', 'E' and 'F', it is revealed that said marks 'B', 'E' and 'F' were found containing Petroleum Hydro Carbon particles and traces.

While marks 'A', 'C', 'D' and 'G' have no traces of the said article of Petroleum Hydro Carbon.

Coming to the details given at page 97, marks 'A', 'C', 'D' and 'G' reveal to be the articles connected with the accused.

16. Here if we turn to postmortem note produced on record at exhibit 6, as also exhibit 4 (page 12), we find that kerosine was poured over the deceased right from the head to foot. Hardly any part of the body of the deceased had remained untouched with the fluid, as a result she was practically roasted all over the body. The concentration appears to be on the torso part including pubic region where external genital were extensively burnt. Sexual motive can, thus, be made out

on the basis of nature of injuries. But while considering the aforesaid aspect, absence or presence of kerosine traces on the accused be considered. This would indicate that when a person is taking an attempt on his/her life by way of pouring kerosine and setting him/her aflame, obviously such person would be resisting from kerosine having poured and being burnt. In the said process of resistance the offending person ought to be exposed to kerosine and in this manner any one who tries to pour kerosine on another person and faces resistance is likely to have few drops of kerosine either on his/her person or on the apparels wore by him/her for the reasons which are obvious. As on account of resistance the container of kerosine would also get shaken, the attempt to pour kerosine would be thwarted and in the process the kerosine would drop on the floor resulting few splashes falling on the floor and also on the person who is pouring kerosine. The person who is very much there cannot spare himself/ herself from getting his/her share of this fluid falling on the body or clothes/ apparels that he/ she was wearing.

17. The situation that emerges, therefore, is that here is a person who claims from the beginning that he has tried to save the woman and he has received burn injuries in the process. The fact of having received burns is clearly made out by the papers that were brought from V.S. Hospital as well as from Civil Hospital, where he was transferred within 24 hours. These documents are at exhibits 83 and 35. He has received about 15 per cent; second or third degree burns. This would clearly indicate on the one hand the intensity of fire generated by kerosine and on the other hand the fact that on account of polyester fibre clothes which the accused was wearing at the time of incident he had received those burns. However, there is absence of kerosine traces on these articles and absence of kerosine on the quilt.

18. No doubt, in the course of trial the defence has tried first to proceed on theory of suicide and also again tried to come back to the case as disclosed in statement at exhibit 11 and further compounded by making the version exh. 1 in further statement under sec.313.

19. In the statement at exhibit 11, the accused/ appellant has come out with the case as narrated earlier and it is not disclosed about his having any conversation whatsoever with the deceased. In statement under sec.313, the main indication is firstly to the effect that Bhupatsinh has gone out. By the time he enters, the accused has seen Bhupatsinh leaving the house of the

deceased. He finds smoke emanating from the house. Therefore, the accused enters the house and he saw Lilaben burning. The accused tries to save her by throwing quilt over her body. He had conversation with the deceased, whereby deceased Lilaben reveals that Bhupatsinh has poured kerosine on her with a view to kill her.

20. The variation, no doubt, is startling. Ultimately, so far as the accused is concerned he came on the scene when he saw deceased Lilaben burning and he tried to put off the flame and save her.

21. In this background one more aspect is required to be added and it is 'silence' on the part of neighbours. PSI Shri Gohil clearly states in deposition that when he went there he saw the house of neighbours locked. Earlier Laljibhai, the complainant, who gives the complaint, finally however relies upon the information that is said to have been collected by the complainant from the neighbours. Thus, the neighbours are none else than the women of the area, who had gathered at the house of the deceased at 11.00 AM. When the complainant had come there the women had collected there for one of the usual activities of said women, namely, to prepare Gujarati savory item known as 'papad'. The presence of these women, therefore, is quite natural. In this background, however, the attempt made by the Police though according to Shri Gohil, PSI, since the house was locked, he has failed in respect of his efforts of recording statements of neighbours. One such witness is Hansaben, PW 6, exh. 14 (page 42). But she has not supported the prosecution at all. Learned APP in the trial court has taken precaution to put her entire statement in her cross examination and she has consistently denied to have given any such statement to the Police. No doubt, the prosecution has done its duty by bringing about the correct facts of the previous statement through concerned investigating officer. This would not carry out prosecution case any further.

22. The question, therefore, arises is that on the one hand it is the accused who is pointing towards Bhupatsinh and on the other the accused is being implicated on the strength of the complaint given by the brother of the deceased, who places reliance on the material that he is said to have collected from the neighbours, who in turn, are not available to the Investigating Officer at all, right from the beginning. The Investigating Officer comes on the scene without knowing as to who has committed the crime. This is the

shaky foundation upon which the prosecution is to rest on.

23. On perusal of FIR it becomes quite clear that the entire information is based on hearsay. That being the position, the persons who gave information to the complainant are required to come and support the prosecution, as they being friends of the informant and though the prosecution having made attempts, could not succeed.

24. Then the case, as aforesaid, failure on the part of the prosecution to investigate and the suggested statement of the accused against Bhupatsinh and particularly absence of kerosine traces as discussed above, is to be taken into account.

25. What, therefore, is left in the field is the only statement of Jayaben, the daughter of the deceased, aged about 13 years. There is material on record indicating that they could be at the house from 11.00 AM or so and would also be there at the time when the accused has returned with burn injuries in the manner stated above. However, it is the say of Jayaben also in her deposition, exhibit 16, PW 8 (page 45) that when the accused came back to the house in injured condition, he had driven every one out of the house and his wife Rashida came to be the only person inside the house. According to Jayaben, she while standing, had heard one sentence in Hindi spoken by the accused that he has come back after burning Lilaben. This statement is the only one which the prosecution is left with and relied upon. No doubt, learned APP Shri Y.F. Mehta, had taken pains to take us through cross examination of this witness and therefore, submitted that she has not been shaken so far as this statement is concerned.

26. We agree with the learned APP. Yet we are of the opinion and we express ourselves in agreement with the submission made by Shri Barot, learned advocate for the appellant, that taking the totality of the circumstances narrated above and in the background of the facts, such as, like the accused Mohammed Yunus, Bhupatsinh was also on visiting terms at the house of the deceased by virtue of the fact that all the said three persons, namely, Amritgiri, Bhupatsinh and Mohammed Yunus were serving together in Police Force and that they came to be suspended together on different occasions and as such they knew each other well enough to be so closely connected.

27. As for the conduct of the accused after reaching home soonafter the incident, it is seen that the accused was the first to go to Ranip Police Chowky, trying to get some help in terms of ambulance, failing which he goes to the hospital on his own, discloses the details to the doctor, as could be gathered from V.S. Hospital case papers, exhibit 32, which also involve Bhupatsinh in the incident, by stating that pouring of kerosine by Bhupatsinh. The accused reaches V.S. Hospital at 3.40 PM. This was followed by Police Yadi from Sabarmati Police Station through Hospital Duty Constable.

28. Learned advocate Shri Barot had, therefore, relied upon the Apex Court decision in Jamuna Chaudhary and others v. State of Bihar, AIR 1974 SC 1822, where Their Lordships have stated (in Head Note 'A') that ;

"The duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth."

Shri Barot, learned advocate further relied on Head Note 'B' of the above Apex Court judgment, which reads thus:

"Where neither the prosecution nor the defence come out with the whole and unvarnished truth, to enable the Court to judge where the rights and wrongs of the set of incidents lay or how one or more incidents took place in which so many persons, including the deceased and one accused person, were injured, courts can only try to guess or conjecture to decipher the truth, if possible."

It is further observed that

"This may be done, within limits to determine whether any reasonable doubt emerges at any point under consideration from proved facts and circumstances of the case."

29. Factually, in the aforesaid decision of the Apex Court there were several injured persons involved belonging to both the sides and there was one death. For this factual background, observation in Head Note 'B' has

been made. But especially, in our opinion, it lays down the principle of "absence of truth being brought out by either side". The Court can raise reasonable doubt, if circumstances so warrant. Obviously, when reasonable doubt is created the benefit thereof would go to the defence.

30. In our opinion, the doubt is created so far as involvement of the accused/ appellant is concerned. Though there is statement of Jayaben, in our opinion, it will not be safe to rely upon the only material to hold the accused guilty beyond reasonable doubt.

31. The net result, therefore, is that the appellant/ accused succeeds. The Appeal is allowed. The order of conviction and sentence is quashed and set aside. The appellant is given benefit of doubt. The accused/ appellant is, therefore, ordered to be set at liberty forthwith, if not required in any other case. Fine, if any paid should be refunded.

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